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No. 88-1029

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

YONKERS RACING CORPORATION,
Petitioner,

v.

THE CITY OF YONKERS,
Respondent,

and

UNITED STATES OF AMERICA and YONKERS BRANCH NAACP, *et al.*,
Intervenor-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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SUPPLEMENTAL BRIEF FOR PETITIONER

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Mesa v. California, 57 U.S.L.W. 4199, decided February 21, 1989, is very relevant to this petition. The issue in *Mesa* was whether a state court prosecution of a federal employee could be removed pursuant to 28 U.S.C. § 1442 absent the assertion of a federal defense to that proceeding. Reliance upon such a defense, as a predicate for removal, had been required by the decisions of this Court for more than 100 years. The United

States argued that no such requirement is contained in the statute and that "substantial federal interests . . . would be protected by permitting universal removal of all civil actions and criminal prosecutions brought against any federal official 'for the manner in which he has performed his federal duties' " (57 U.S.L.W. at 4203).

This Court rejected this effort to expand the removal jurisdiction of the federal courts and emphasized the importance of the principles relied upon by the Raceway.

> "The Government's view, which would eliminate the federal defense requirement, raises serious doubt whether, in enacting § 1442(a), Congress would not have 'expand[ed] the jurisdiction of the federal courts beyond the bounds established by the Constitution.' *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491 (1983). In *Verlinden*, we discussed the distinction between 'jurisdictional statutes' and 'the federal law under which [an] action arises, for Art. III purposes,' and recognized that pure jurisdictional statutes which seek 'to do nothing more than grant jurisdiction over a particular class of cases' cannot support Art. III 'arising under' jurisdiction."
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> . . .
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> "The 'Arising Under' Clause provides: 'The judicial Power [of the United States] shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. Const., Art. III, § 2, cl. 1.
>
> "*Section 1442(a), in our view, is a pure jurisdictional statute, seeking to do nothing more than grant district court jurisdiction over cases in which a federal officer is a defendant. Section 1442(a), therefore, cannot independently support Art. III 'arising under' jurisdiction. Rather, it is the raising of a federal question in the officer's removal petition that constitutes the federal law under which the action*

against the federal officer arises for Art. III purposes."

. . .

"Adopting the Government's view would eliminate the substantive Art. III foundation of § 1442(a)(1) and unnecessarily present grave constitutional problems. We are not inclined to abandon a longstanding reading of the officer removal statute that clearly preserves its constitutionality and adopt one which raises serious constitutional doubt. *See Califano v. Yamasaki*, 442 U.S. 682, 693 (1979) ('if a construction of the statute is fairly possible by which [a serious doubt of constitutionality] may be avoided,' *Crowell v. Benson*, 285 U.S. 22, 62 (1932), a court should adopt that construction') (brackets in original)." (emphasis added) 57 U.S.L.W. at 4203-04.

Mesa reaffirms that subject matter jurisdiction is not provided by the removal statutes. It is submitted that *Mesa* effectively disposes of the foundation of the instant Court of Appeals determination that removal can be based upon grounds outside the removal statutes and does not require the presence of an independent basis for subject matter jurisdiction.

As discussed in the Raceway's reply memorandum, the NAACP concedes that subject matter jurisdiction is not present and the United States and City of Yonkers have submitted nothing indicating a source of authority for the assumption of control over a portion of this state court proceeding by the District Court.

Respectfully submitted,

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